43a. Noting that petitioners' alleged activity included coordinating a boycott by local German agents, the court explained that petitioners' conduct did not "need[] to be exclusively—or significantly—relating to the foreign inland segment of through transportation" to "concern" the foreign inland segment within the meaning of the statute. Pet. App. 45a.

The Fourth Circuit reversed, relying heavily on "the principle of narrow construction for antitrust exemptions." Pet. App. 10a. Although the conduct at issue took place primarily overseas, involved foreign agents, and was subject to foreign regulation, the court of appeals "s[aw] no reason to depart" from what it called "ordinary practice" in interpreting the scope of the Act. *Ibid.* In so holding, the court of appeals gave no consideration to foreign nations' interests in regulating foreign commerce. Rather, because petitioners' agreement with the German movers was "aimed at" the entire through transportation market, and because petitioners contacted other U.S. freight forwarders to inform them of the boycott, the court held that petitioners' activities did not "concern" the foreign inland segment of through transportation. Therefore, the exemption did not apply. *Id.* at 11a.

C. Foreign Proceedings Against Gosselin

Meanwhile, petitioners' conduct has not been overlooked by foreign authorities. In Germany, where nearly all the events at issue took place, the Bundeskartellamt ("German Federal Cartel Office" or "Office"), opened a formal investigation of Gosselin in 2002. The matter is pending, but the Office has investigated the boycott claims and issued an Interim Decision finding that Gosselin participated in quasi-criminal price-fixing and illegal market area restriction agreements in several regions in connection with moving services for the United States military forces, in violation of German antitrust law. The Office has also proposed to fine Gosselin approximately €2.5

million (roughly $3.02 million at current exchange rates), and has entered similar Interim Decisions as to five other companies who participated in the cartel.

Moreover, if and when the Office proceeds to final decision against Gosselin, it will likely refer the matter to the European Union Competition Commissioner, who has authority to impose further penalties under Articles 81 and 82 of the treaty establishing the European Community, O.J. C 224/1 (1992), at 64-65.[2]

REASONS FOR GRANTING THE PETITION

The court of appeals' decision plainly merits plenary review. Two Terms ago, in *F. Hoffman-LaRoche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164-165 (2004), this Court "caution[ed] courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws," so as to ensure that "the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world." Indeed, the Court in *Empagran* readily acknowledged that "America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs." *Id.* as 165. And the Court instructed that American courts should "ordinarily construe[] ambiguous statutes to avoid unreasonable

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[2] The Office also opened quasi-criminal proceedings against Marc Smet, Chief Executive Officer of Gosselin, for allegedly violating provisions of the German competition law that prohibit price-fixing and area agreements and inciting boycotts. That office ultimately dismissed those proceedings, but on the ground that Smet was the subject of another criminal investigation involving the same activities but brought by prosecutorial authorities in Kaiserlautern, under §§ 263 and 298 of the Criminal Code. That investigation remains pending as well.

interference with the sovereign authority of other nations." *Id.* at 164.

Although *Empagran* is the latest word from this Court on the extraterritorial application of U.S. antitrust laws, the opinion below does not even reference that decision. Instead, the court went to great lengths to conclude that "the traditional canon of narrow construction, applicable to antitrust exemptions generally, applie[s] with full force" to the Shipping Act. Pet. App. 9a. And the court of appeals' "interpretive framework" (*id.* at 10a) gave *no* consideration to foreign sovereigns' interests in ensuring that extraterritorial applications of U.S. antitrust laws do not interfere with the regulation of anticompetitive conduct on foreign soil.

The decision below warrants review for two reasons beyond the circuit conflict noted in the petition. First, as explained below in Section I, the court of appeals' interpretation of the Shipping Act undermines foreign nations' sovereign interests in regulating their own commerce. Price-fixing and other anticompetitive practices are closely regulated by nations such as Belgium, Germany, and the European Community (among others), but the regulatory approaches of these jurisdictions differ markedly from that of U.S. officials. These nations have a powerful interest in deciding for themselves how to regulate such conduct when it occurs within their borders.

Second, as explained in Section II, the court of appeals' interpretation directly threatens the antitrust enforcement efforts of these and other nations. For example, many nations use leniency programs to obtain information about cartels. Yet companies in such jurisdictions will be deterred from taking part in these programs, and from otherwise cooperating with foreign authorities, if their admissions in those jurisdictions can subject them to *criminal liability* in the United States. Indeed, the ongoing German investigation

here confirms that the risk of such "double jeopardy" is real for foreign firms.

For both of these reasons, the question whether the Shipping Act exemptions at issue here extend to *foreign* conduct that most directly concerns *foreign* competitors and nations is of enormous importance to international commerce and diplomacy. If the Act is to be interpreted to upset the balance that Congress struck between domestic and foreign antitrust regulation, such a decision should come from this Court, not from a single court of appeals whose decision conflicts with the Ninth Circuit's decision on the same issue. See *United States* v. *Tucor Int'l, Inc.*, 189 F.3d 834 (9th Cir. 1999).

I. Certiorari Is Warranted Because The Court Of Appeals' Interpretation Improperly Fails To Accord Any Deference To Foreign Sovereigns' Interests.

In adopting its narrow construction of the Shipping Act's exemption of foreign conduct, the court below gave no consideration to foreign nations' interests. As explained below, this approach is contrary to well-settled principles of U.S. and international law. And it ignores the legislative history of the 1984 amendments to the Shipping Act, which demonstrate that Congress was greatly concerned about extraterritorial enforcement of the antitrust laws and the effect of such enforcement on international regulation.

A. United States law and international law and comity establish that U.S. antitrust law must be read with deference to foreign nations' interests.

It is well settled as a matter of both United States and international law that nations should consider the sovereign interests of other nations before exercising their jurisdiction extraterritorially. This principle of "prescriptive comity" informs judicial interpretation of federal statutes: courts must "ordinarily construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of

other nations," because they "must assume[] Congress ordinarily seeks to follow" the "principles of customary international law." *Empagran*, 542 U.S. at 164. The court of appeals did not address these principles, let alone accord deference to the interests of the nations with the strongest interests in regulating the conduct at issue.[3] To the extent that there is any ambiguity in the Shipping Act exemptions,[4] consideration of foreign nations' interests counsels against reading those exemptions narrowly and in a way that excludes from their protection the conduct at issue here.

First, several important factors that should always guide a comity analysis—primacy over the transaction, the locus of the conduct, the locus of the conduct's effects, and the strength of the foreign state's policies on the issue—confirm that foreign interests should predominate here. See, *e.g.*, *Empagran*, 542 U.S. at 165. Apart from petitioners' efforts to inform U.S. freight forwarders of their boycott, virtually all of the conduct at issue took place in Germany. Further, Germany and the European Community already regulate the anticompetitive conduct here—indeed, the German

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[3] See also *id.* at 176 (Scalia, J., concurring in judgment) (endorsing the majority's application of "the principle that statutes should be read in accord[ance] with the customary deference to the application of foreign countries' laws within their own territories"); *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (L. Hand, J.) (U.S. statutes should be interpreted with "regard to the limitations customarily observed by nations upon the exercise of their powers").

[4] We agree with petitioners that the agreements here "concern" the foreign inland segment of the through transportation market, and thus are exempt from antitrust regulation under 46 U.S. app. § 1706(a)(4), without regard to the principle of prescriptive comity. That principle merely confirms—and strongly so—the correctness of petitioners' reading.

authorities propose to fine Gosselin €2.5 million for it. The effect of that conduct, moreover, was felt most immediately by other German moving agents who lost business when the boycott led the low-bidding freight forwarders to abandon their prime and "me-too" bids. Cf. *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 819 (1993) (Scalia, J., dissenting) (citing similar factors as supporting a narrow construction of the Sherman Act under principles of prescriptive comity).

Second, the principle that U.S. laws should be interpreted with deference to the interests of foreign nations applies with particular force in *criminal* cases. As the Restatement (Third) of Foreign Relations Law of the United States explains:

> [I]n the case of regulatory statutes that may give rise to both civil and criminal liability, such as United States antitrust and securities laws, the presence of substantial foreign elements will ordinarily weigh against application of criminal law. In such cases, legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication.

Section 403, cmt. *f*, at 247. Indeed, because "the exercise of criminal ... jurisdiction in relation to acts committed in another state may be perceived as particularly intrusive," "criminal jurisdiction over activity with substantial foreign elements should be exercised more sparingly than civil jurisdiction over the same activity, and only upon strong justification." *Id.*, reporters' note 8, at 253.

Third, general international law likewise requires respect for foreign nations' interests. For example, the OECD, of which the United States and Belgium are members, urges its members to recognize "the need . . . to give effect to the principles of international law and comity and to use moderation and self-restraint in the interest of co-operation on the field of anticompetitive practices."

Recommendation of the Council concerning Cooperation between Member Countries on Anticompetitive Practices affecting International Trade, adopted July 27, 1995, OECD Doc. No. C(95)130/FINAL. More recently, the OECD charged its members to "cooperate with each other in enforcing their laws against [hard core] cartels," and to "conduct their own enforcement activities in accordance with principles of comity when they affect other countries' important interests." *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, adopted March 25, 1998, OECD Doc. No. C(98)35/FINAL.

Both U.S. and international law therefore require that courts considering the extraterritorial application of federal statutes interpret such statutes with deference to foreign nations' interests. The court below ignored those interests, however, and review is warranted to ensure that its overly expansive interpretation of U.S. antitrust law does not impinge on foreign countries' sovereignty.

B. The court of appeals' decision is inconsistent with Congress's expressed intention to promote deference to foreign governments in this context.

The court of appeals ignored the interests of foreign nations largely by relying upon the principle that antitrust exemptions should be narrowly construed. Pet. App. 11a-14a. But that principle did not originate in cases involving extraterritorial regulation, let alone *criminal* extraterritorial regulation. And the cases cited by the court below as support for the principle by and large involve domestic regulation. See *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 126 (1982) (domestic health insurers' peer review is not "business of insurance" for purposes of McCarran-Ferguson Act); *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 231 (1979) (insurers' agreements with pharmacies are not exempted by McCarran-Ferguson Act); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 374 (1973) (domestic power companies are not exempt from Sherman Act); *United States*

v. *McKesson & Robbins*, 351 U.S. 305, 316 (1956) (Miller-Tydings Act does not exempt price-fixing of domestic drug companies); *United States* v. *Borden Co.*, 308 U.S. 188, 198-200 (1939) (Agricultural Marketing Agreement Act does not exempt price-fixing in milk).

1. To be sure, two of the cases that the court below cited to support its narrowing construction did involve the Shipping Act. See *Federal Maritime Comm'n* v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973); *Carnation Co.* v. *Pacific Westbound Conf.*, 383 U.S. 213 (1966). But those cases provide no support for the court's conclusion. To begin with, the parties in those cases were arguing for an exemption on the basis of *implied* repeals, which of course are disfavored. See *Seatrain*, 411 U.S. at 733; *Carnation*, 383 U.S. at 217. Here, by contrast, the issue here is the proper interpretation of three *express* antitrust exemptions.

Moreover, both of the Shipping Act cases relied upon by the court of appeals predate the 1984 amendments to the Shipping Act, and the history of those amendments demonstrates the impropriety of relying on a narrowing construction here. The 1984 amendments were adopted in large part out of "concern about undue extension of antitrust principles into regulation of international maritime transportation and unequal treatment between U.S. flag and foreign flag carriers." H.R. Rep. No. 98-53, pt. I, at 9 (1983). Indeed, Congress criticized this Court's decision in *Carnation* on the ground that it "confirmed those concerns" in giving "disproportionate weight" to "[a]ntitrust standards" in the international transportation market, *id.* at 9 & n.1. Thus, Congress sought in the 1984 amendments "to legislatively overturn *Carnation*." S. Rep. No. 97-414, at 8 (1982).

It is therefore ironic, to say the least, that the court of appeals would rely on these pre-1984 cases to hold that it was required to adopt a narrowing construction of the Act's antitrust exemptions. Compare, *e.g.*, *Carnation*, 383 U.S. at

218 ("The Congress which enacted the Shipping Act was not hostile to antitrust regulation."), with S. Rep. No. 97-414, at 26, 34 ("[T]he antitrust laws will have no place with respect to activities and agreements authorized or prohibited under this bill"). Contrary to the court of appeals, to the extent that there is any ambiguity in the Shipping Act exemptions, deference to foreign nations' interests requires that the Act be interpreted *not* to apply extraterritorially.

2. More generally, the history of the Shipping Act of 1984 confirms that Congress was influenced by the sovereign interests of foreign nations in determining the extent to which it would exercise its prescriptive jurisdiction under the Act. Under the prior regime, U.S. officials had indicted "foreign citizens employed by foreign lines" under the U.S. antitrust laws, and "several governments protested the indictments." H.R. Rep. No. 98-53, pt. 1, at 7. Some nations objected to U.S. jurisdiction "on the ground that what the executives had done was not illegal in their home countries and, thus, they should not be subjected to prosecution in the United States." *Ibid.* Others objected on the ground that "the parties never contemplated the double jeopardy to which they had been exposed" (*ibid.*)—precisely the problem now faced by the defendants here as a result of the ongoing German investigation.

Thus, as Senator Gorton, the 1984 Act's sponsor, stated concerning prior law:

> [T]he regulatory system strains our international relations. Our trading partners claim the extension of our antitrust laws constitutes an outrageous intermeddling in international commerce, which subjects foreign carriers and shippers to laws and general competitive concepts that are completely foreign to them. In fact, some European nations ... have passed "blocking statutes" which prevent their companies from responding to and cooperating with the Department of Justice when it seeks to exercise its antitrust authority.

Cong. Rec. S [illegible]77 (Feb. 24, 1983).[5] Congress was thus "concern[ed] [illegible]ut undue extension of antitrust principles into regulation of international maritime transportation." H.R. Rep. No. 98-53, pt. I, at 9.

It was against this backdrop that Congress adopted the new Shipping Act exemption. In so doing, Congress "recognize[d] the strong public benefits in pursuing regulatory policies in a manner that maintains harmonious and cooperative international relations." *Id.* pt. 2, at 19. Indeed, Congress openly "acknowledge[d] the need of our foreign policy to adjust to the realities of other governments' laws and policies, even if counter to our competition principles." *Ibid.* And Congress charged federal officials to "exercise [their] authority ... with sensitivity to the goals of our foreign policy and the fostering of international comity." *Id.* at 20, 21.

In short, the Shipping Act exemption was a textbook example of Congress "seek[ing] to follow" the "principles of customary international law." *Empagran*, 542 U.S. at 164.

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[5] Accord Cong. Rec. S1487 (Feb. 22, 1983) (statement of Sen. Gorton); *1981 Shipping Act: Hearing Before Subcomm. on Merchant Marine of the Sen. Comm. on Commerce, Science, and Transp.*, 97th Cong. 208 (1981) (statement of Dr. Henry De La Trobe, Vice Chairman, Council of European and Japanese Nat'l Shipowners Ass'n) ("other countries take strong issue with the application of the antitrust laws as well as the Shipping Act to transportation arrangements and activities performed within their jurisdictions"); Cong. Rec. S1679 (Feb. 24, 1983) (statement of Sen. Inouye) (noting that the United Kingdom, Belgium, Sweden, France, Finland, the Netherlands, Germany, Australia, and Norway had enacted blocking statutes); see also A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257, 258 (1981) (summarizing the history of the British blocking statute and stating that "[t]he main concern of the prolonged Anglo-American disagreement over jurisdiction is the extraterritorial scope of American antitrust laws and of the regulations, particularly those relating to the shipping industry").

And the contrasting failure of the court below to "take[] account of the legitimate sovereign interests of other nations" (*ibid.*) warrants review by this Court.

II. The Court Of Appeals' Interpretation Of The Shipping Act Threatens Negative Consequences for Global Antitrust Enforcement.

The court of appeals' failure to accord any deference to the interests of foreign nations in interpreting the Shipping Act's antitrust exemptions also threatens adverse effects on global antitrust enforcement. As shown below, the decision impinges on the prerogative of foreign nations to regulate anticompetitive behavior in ways that, while distinct from the U.S. approach, nevertheless serve the same ends. The decision below also threatens to remove the incentive for foreign firms to take part in foreign leniency programs, the success of which depends upon certainty that their cooperation will protect them from *any* further liability, and certainly from *criminal liability* in the United States.

A. The decision below impedes other nations' ability to regulate competitive behavior in ways that differ from U.S. law.

There can be no doubt that the decision below threatens to impinge on foreign nations' legitimate choices about how to regulate their markets. To be sure, price-fixing is prohibited almost universally, and the ongoing German investigations discussed above confirm that other nations already have laws that punish and deter anticompetitive behavior. Conduct like that involved here will rarely if ever go unregulated and unpunished.[6]

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[6] Of course, the United States is free to invoke its "positive comity" agreement with the EU, under which it may request that the EU initiate enforcement activities. The United States and the EU have had a comity agreement in place since 1991, and the two parties built upon that agreement in 1998. See *Agreement Between*

1. Still, there are critical differences between the regulatory approaches of foreign sovereigns and those of the United States, and imposing the U.S. approach on foreign nations can disrupt the enforcement of their laws. For instance, while the U.S. in this case brought a criminal action, Belgian officials rely primarily upon administrative enforcement bodies to investigate and prosecute violations of the Belgian Act. These bodies include the Competition Service, which is responsible for detecting restrictive practices; the Corps of Rapporteurs, which organizes investigations and issues reports; and the Competition Council, an administrative court with the authority to render decisions.[7] Likewise, Germany's and the EU's deterrence efforts focus on quasi-criminal administrative prosecution. See Jason Hoerner, *Competition Law in the European Union: A Dual Enforcement System*, available at http:// www. antitrust. de/kartellrecht. htm. These approaches lack the stigma of a full-blown criminal prosecution and involve no risk of incarceration – important differences to firms in these jurisdictions.

There are also substantive differences between U.S. and foreign law. For example, the EU's "Article 81 is of wider ambit than Section 1 of the Sherman Act and can catch conduct ... which involves a lesser degree of culpability

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the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 4, 1998, reprinted at 37 I.L.M. 1070 (1998). Among the Agreement's purposes is to "[e]stablish cooperative procedures to achieve the most effective and efficient enforcement of competition law, whereby the competition authorities of each Party will normally avoid allocating enforcement resources to dealing with anticompetitive activities that occur principally in and are directed principally towards the other Party's territory." *Id.* at 1071.

[7] An English translation of the Belgian Act is available at: http://mineco.fgov.be/redir_new.asp?loc=organization_market/competition/competition_en_002.htm.

than its U.S. counterpart." Roderick Lambert, *Parallel Antitrust Investigations: The Long Arm of the DOJ from the Perspective of an E.U. Defense Counsel*, 14 LOY. CONSUMER L. REV. 509, 519 (2002). Moreover, the "Court of Justice has emphasized that [EU competition law] is not the same as the Sherman Act in that there are no per se violations" under EU law. *Ibid.* In addition, while U.S. authorities determine the lawfulness of certain agreements restraining trade by applying a "rule of reason" analysis, the Belgian and German laws contain broad prohibitions of cartels with enumerated exceptions. Belgian Act, art. 2, § 1, art. 2, § 3; GWB, §§ 1-3. These are just a handful of the important differences between U.S. and European law.

That is not to say that foreign enforcement is any less vigorous than American enforcement. But the varying approaches of jurisdictions such as Belgium, Germany, and the EU sometimes result in different decisions as to the method of enforcement or even whether enforcement is appropriate at all.

2. These differences create an obvious possibility of conflict if U.S. authorities attempt to apply U.S. antitrust law to foreign conduct. For example, if a European jurisdiction concludes that an activity conducted on its soil is pro- rather than anti-competitive, a decision by U.S. authorities to challenge that same conduct will undermine implementation of the European jurisdiction's competition policy.

Further, regardless of whether the various systems produce different outcomes, U.S. law should not trump the right of foreign nations to make and apply their own competition policies. As the Justice Department has noted: "the more that the conduct of foreign businesses in foreign countries becomes subject to the regulatory effect of decisions by United States courts, the more our antitrust laws risk impinging inappropriately on the economic policies and sovereignties of foreign countries." See Makan

Delrahim, *Department of Justice Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications*, Speech Before the American Bar Association Section on Antitrust law, Washington, D.C. (Nov. 18, 2003), available at http://www.usdoj.gov/atr/public/speeches/201509.htm.

Without so much as considering the fundamental right of foreign sovereigns to regulate their own markets, the court of appeals extended the U.S. antitrust laws to conduct that took place almost entirely within foreign jurisdictions. That decision warrants review by this Court.

B. The court of appeals' reading of the Shipping Act exemptions destroys the incentive for foreign firms to cooperate with foreign antitrust authorities.

The court of appeals' decision also creates a more specific threat to foreign antitrust enforcement, i.e., by reducing foreign firms' incentive to cooperate with foreign antitrust authorities. As this Court recognized in *Empagran*, the prospect of liability under U.S. law "undermine[s] foreign nations' own antitrust enforcement policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty." 542 U.S. at 168. Left unchecked, the decision below poses a far greater threat to foreign firms' cooperation with antitrust authorities than did the private actions at issue in *Empagran*.

As noted above, price-fixing and other anticompetitive cartel arrangements are expressly prohibited by Article 81 of the treaty establishing the European Community, and the Commission vigorously enforces that prohibition.[8] The

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[8] The EC's Competition Directorate-General is devoted exclusively to detecting and combating cartels, and the Commission has imposed €1,096,449,100 in fines since 2003. See http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/05/454&format=HTML&aged=0&language=en&guiLanguage=en.

Commission's recently expanded leniency policy, however, grants total immunity to the first firms that provide insider information that either discloses a previously undetected cartel or leads to successful prosecution of the cartel members. In addition, the program provides reduced fines for companies that fail to qualify for immunity but provide "significant added value" to the Commission's investigation and terminate their participation in the cartel.[9] The first company that satisfies these conditions is eligible to receive a 30-50 percent reduction in fines, the second company a 20-30 percent reduction, and subsequent companies a reduction of up to 20 percent.[10]

The Commission's leniency program thus seeks to balance interests of disclosure, deterrence, and punishment against effective enforcement, a balance it achieves through the prospect of immunity or reduced and fixed penalties.[11] Not surprisingly, this system provides a powerful incentive for European firms to disclose information about cartels.

The incentive to cooperate is undermined, however, if a foreign company risks subjecting itself to *criminal prosecution* by U.S. authorities for confessing to the Commission that it has participated in price-fixing within its jurisdiction. As a U.S. Justice Department official recently stated in reference to the U.S. amnesty program, firms are unlikely to apply for leniency "[i]f [they] cannot predict, with a high degree of certainty, their treatment following cooperation. ... Uncertainty ... will kill an amnesty program." Scott D.

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[9] Http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/02/247&format=HTML&aged=1&language=EN&guiLanguage=en.

[10] *Ibid.*

[11] See Official Journal of the European Communities, Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases ¶ 3 (2002/C 45/03); Http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/02/247&format=HTML&aged=1&language=EN&guiLanguage=en.

Hammond, *Lessons Common to Detecting and Deterring Cartel Activity*, Address at the 3rd Nordic Competition Policy Conference (Sept. 12, 2000), available at http://www.usdoj.gov/atr/public/speeches/ 6487.htm.[12]

In short, the prospect of potentially ruinous criminal liability in U.S. courts—perhaps dual liability, depending on the extent to which Commiss on officials offer leniency—far outweighs the benefits that most companies would receive from taking part in a foreign leniency program. See, *e.g.*, Jason D. Medinger, Comment, *Antitrust Leniency Programs: A Call for Increased Harmonization as Proliferating Programs Undermine Deterrence*, 52 EMORY L. J. 1439, 1448 (2003) ("the fact that a confession in the EU may expose a cartel member to a U.S. investigation, which may result in jail time," makes the program "less attractive").

The court of appeals gave no consideration to these important factors in adopting its narrow construction of the Shipping Act's antitrust exemptions. But its decision directly threatens the antitrust enforcement efforts of foreign nations that offer leniency to their corporate citizens. In the process, that decision *undermines* the policy of detecting and deterring illegal price fixing that underlies the Sherman Act. Certiorari is warranted to correct that fundamental error.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[12] The Department of Justice has similar leniency programs. See U.S. Department of Justice Antitrust Division, *Corporate Leniency Policy* (Aug. 10, 1993); U.S. Department of Justice Antitrust Division, *Individual Leniency Policy* (Aug. 10, 1994).

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